Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 4(g) of	)	MM Docket No. 93-8
the Cable Television Consumer	)	
Protection and Competition	)	
Act of 1992	)	
	)	
Home Shopping Station Issues	)	

TO: The Commission

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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Summary

Section 4(g) of the Cable Act delays the must carry eligibility of stations which offer an entertainment format predominantly devoted to sales presentations, and requires the Commission to determine whether such stations are serving the public interest, convenience, and necessity. The Commission should conclude, as it has before, that shopping format stations serve a public need and, if their non-entertainment programming responds to the needs and interests of their communities, such stations are fully eligible for mandatory cable carriage.

The Commission should define the stations at issue in this proceeding as those which offer, on a regular basis, program-length sales presentations for more than half of their broadcast day. Fewer hours of full-length sales presentations could not be viewed as a station's predominant program offering. Further, the time which a station uses for spot advertising during other programming should not be taken into account in determining its regulatory status.

A station's choice of shopping presentations as its entertainment program format should not result in any finding that the station fails to serve the public interest. The Commission and the courts have recognized that regulation of stations' programming choices is unwise. The adoption of unique shopping formats by certain stations reflects a previously unmet public need and fulfills the Commission's expectation that

view this proceeding as an informal means of reallocating specific channels for non-broadcast uses. The fact that the Commission has renewed shopping format stations' licenses demonstrates that no superior alternative broadcast use for those channels has been advanced.

The availability of shopping programming has also made it possible for many new stations, particularly minority-owned stations, to begin service in an era when many cable systems routinely denied carriage to new television stations. The option of providing a shopping format has thus advanced the public interest in increased minority ownership of television stations.

Finally, if the Commission concludes that some stations which offer shopping formats have not served the public interest, it must allow those stations the opportunity to find other programming. The Act does not allow the Commission to fashion an intermediate class of broadcast stations, eligible for license renewal, but denied must carry rights. Any station meeting the statutory public interest standard is fully eligible for mandatory carriage on cable systems in its market.

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Definition of a Station Predominantly Utilized for the Transmission of Sales Presentations or Program Length Commercials

As the Commission recognizes (*Notice* ¶ 5), the first question it must address is which stations should be deemed to fall within the statutory classification. In its *Notice of Proposed Rule Making* in MM Docket No. 92-259, the Commission

material. The time devoted to advertising spots in other programming should not be taken into account in determining the station's regulatory status.

First, doing so would create a substantial burden for both the Commission and licensees. The number and length of all commercial spots which a station airs may not be readily determinable from the station's program schedule or even from its regular advertising records. The amount of advertising time may also vary from day to day. Second, not all breaks in regular programming could be viewed as sales presentations. Some spot times are used for station or network promotions and do not promote the sale of any product. Similarly, spot time also includes PSAs which could not be deemed to be sales presentations. Some public affairs programs often include corporate image advertising which does not ask viewers to buy anything, and is sometimes run on behalf of companies which do not even offer products to the public, such as defense contractors. It would be an overwhelming task to make the individualized determination of the appropriate category for each of these spots that a rule counting regular advertising time within the definition of a shopping station would entail.

Further, there is no indication in the Cable Act or its legislative history that Congress was in any way doubtful about the value of advertising during regular program breaks. Indeed, one of the stated objections of the commercial must carry

viewed the airing of spot advertising by stations as raising any question under the public interest standard.

Stations With Shopping Formats May be Found to Serve the Public Interest

The central question in this proceeding is whether stations which employ a shopping format should be deemed, for that reason alone, not to be serving the public interest, convenience, and necessity. While, as with stations offering other program formats, the determination of whether a particular station is meeting its obligations under the Communications Act depends on an evaluation of that station's record,[3/] the Commission should here reaffirm its conclusion that the public is best served by promoting a variety of program formats for television stations, rather than having the Commission dictate the type of programs which stations may offer.

There is no basis for any suggestion that Congress intended the Commission to conclude that shopping format stations are not serving the public interest. What became section 4(g) of the Cable Act originated in an amendment offered on the Senate floor by Senator Breaux. The Breaux amendment would have exempted shopping format stations from must carry obligations. 138 Cong. Rec. S570 (Jan. 29, 1991). Senator Breaux made clear that, in his judgment, such stations were not serving the public interest in the same manner as more traditional television stations,

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3/ Many stations which offer home shopping formats will no doubt provide evidence of their public service programming to the Commission in this proceeding. Further, as noted *infra*, the Commission has had the opportunity to review shopping stations' records in connection with their applications for license renewal, none of which have been denied.

although he noted that he did not think that their licenses should be revoked. The Senate did not adopt the Breaux amendment, but instead a substitute offered by Senator Graham which was substantively very close to section 4(g) as enacted. *Id.* at S580. After Senator Graham proposed his substitute, the following colloquy ensued:

> "Mr. BREAUX. If the Senator will yield, this is the point I am making on the amendment: is it the interpretation of the author that [the FCC] can come back and say yes, without spelling out how they are meeting the public interest, convenience, and necessity.
>
> "Mr. GRAHAM. The FCC has, as a core part of its responsibility, to make judgments under congressional authorization, as to which licensees meet those standards of public interest, convenience and necessity, and they would be required under this inquiry to . . . make a determination that a station whose programming consists predominantly of sales presentations are [sic] meeting the public interest, convenience, and necessity test. The answer to the question is yes."[4/]

The House cable bill included a provision similar to the original Breaux amendment. The Conference Committee adopted instead a version of the Senate language, and expressed no view whatever as to the outcome of this proceeding. H. REP. NO. 862, 102d Cong., 2d Sess. 74-75 (1992). Congress did not, therefore, require the Commission to undertake this proceeding with any fixed view as to its outcome.

More than a decade ago, the Commission concluded that the Communications Act's goal of diverse program service would not be advanced by regulating the entertainment program formats of broadcast stations. *Entertainment Formats of*

[4/] 138 Cong. Rec. at S581.

Broadcast Stations, 60 FCC 2d 858 (1976), *rev'd sub nom. WNCN Listeners Guild v. FCC*, 610 F.2d 838 (D.C. Cir. 1979)(*en banc*), *rev'd*, 450 U.S. 582 (1981). The Supreme Court noted that:

> "[The Commission] did not assert that reliance on the marketplace would achieve a perfect correlation between listener preferences and available entertainment programming. Rather, it recognized that a perfect correlation would never be achieved, and it concluded that the marketplace alone could best accommodate the varied and changing tastes of the listening public. These predictions are within the institutional competence of the Commission."[5/]

Utilizing this discretion concerning the appropriate level of regulation of broadcast stations' programming choices, the Commission subsequently removed most of its programming regulations, including the restrictions on the amount of commercial time. *Television Deregulation*, 98 FCC 2d 1076 (1984), *recon.* 104 FCC 2d 358 (1986), *aff'd in relevant part sub nom. Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987).[6/] The Commission stated "[i]t is our intention that this change promote licensee experimentation and otherwise increase commercial flexibility." 98 FCC 2d at 1105. Although the Commission stressed that licensees would still be required to address issues of concern to their communities in their programming, how they met this obligation could vary from station to station. "For example, as the number of video outlets increases, a television licensee may, in response to economic

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[5/] 450 U.S. at 596.

[6/] The same policy with respect to radio stations was upheld by the court in *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1438 (D.C. Cir. 1983).

incentives, begin to direct its programming towards a narrower audience." *Id.* at 1092.

The stations at issue in this proceeding directly fulfill the Commission's expectations in its *Television Deregulation* decision. They have adopted a unique format which provides distinct programming on an economic basis which differs from traditional commercial stations. That these stations have succeeded in the market demonstrates that they have responded to a public need, for if there were no audience which desired the services provided by shopping stations, the products promoted on these stations would not sell and the economic basis for the stations' operation would soon collapse.

NAB agrees with the observation in paragraph 7 of the *Notice* that resting public interest determinations on viewing levels raises troubling questions. This is particularly the case since the gross level of viewing which a particular station attracts does not indicate anything about the strength of its viewers' desire for that station's program service. One station, for example, might only attract a small number of viewers, or only viewers during particular dayparts, but those viewers might value that station highly. It would be difficult to assert that the public interest is not being served by that station, especially if other stations serving more general interests are also available to viewers. Nonetheless, while the fact that a station offering one entertainment program format attracted fewer viewers than stations with a different format should not be taken as an indication that the first station is serving the public

interest less adequately than the others, that shopping stations have attracted a viable audience does evidence that they are meeting public needs and wants.

The Act also requires the Commission to assess competing demands for the spectrum used by shopping stations. The Commission inquires (*Notice* ¶ 8) whether it should consider only demands of other television stations, or also spectrum demands of non-broadcast services. There does not appear to be anything in the Act or the legislative history of section 4(g) which indicates that Congress viewed this proceeding as addressing the potential reallocation of broadcast spectrum. If the Commission determines that one or more shopping stations are not serving the public interest, the Act does not direct the Commission to release the spectrum used by such stations for other uses. Instead, the Commission is to allow the licensees of any such stations an opportunity to develop other *broadcast* formats, indicating that Congress did not contemplate other non-broadcast uses for the channels now occupied by shopping stations.[7/]

As for competing broadcast needs, the Commission's renewal procedures provide a full opportunity for any entity which can demonstrate that it will provide a

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7/ Moreover, reallocating spectrum to other uses on a channel-by-channel basis would be inefficient. Channels would become available for other uses not because of demand in a particular area, but because of a station's failure to fulfill its public interest obligations. There is no reason for the Commission to suppose that there would be anything more than a coincidental "fit" between the markets where shopping stations provided inadequate service and the markets where there is a high demand for additional spectrum for non-broadcast uses. Further, since the particular channels which might become available would be scattered across the television band, it is unlikely that equipment manufacturers would find it worthwhile to develop transmitters and receivers for these very limited uses.

superior service to a shopping station to compete with that station for a broadcast license. That no shopping station's renewal has been denied by the Commission demonstrates either that there is little competing demand, or that shopping format stations have been able to demonstrate that they are serving the public interest. *See, e.g., Family Media, Inc.*, 2 FCC Rcd. 2540 (1987), *aff'd sub nom. Office of Communication of the United Church of Christ v. FCC*, 911 F.2d 803 (D.C. Cir. 1990).

The Commission should also take into consideration the fact that the availability of shopping programming has aided in the establishment of new stations, and in particular minority-owned stations. As the Commission is aware,[8/] many new stations have been unable to obtain cable carriage in their market areas. Shopping programming has provided a way for these stations to initiate broadcast service and begin to develop audiences, without having to incur the costs of acquiring a full program schedule in the syndication market, particularly where their initial viability as an advertising medium is doubtful due to the lack of cable carriage. Many of these stations would not have survived but for their ability to provide shopping programs. Certainly, the benefits which the Commission's policy of promoting minority ownership of broadcast stations has received from the availability of shopping programs is a significant factor demonstrating that stations using this format have served the public interest.

8/ *See, e.g.*, Comments and Reply Comments of NAB in MM Dkt. No. 90-4 (filed Sept. 25 & Oct. 25, 1991).

The Commission should conclude, therefore, that the fact that a station chooses to provide shopping programs as its entertainment format does not indicate that the station is not meeting its public interest obligations. Like any other station, the performance of shopping stations should be judged on whether they have provided programming, primarily non-entertainment programming, that responds to the needs and interests of their communities. If shopping format stations meet that test, they should be deemed to satisfy the Act's public interest standard.

Shopping Stations May Not be Denied Must Carry Status

Finally, the Commission asks (*Notice* ¶ 12) whether its decision is limited to a choice between whether shopping format stations are or are not operating in the public interest, or could the Commission reach an intermediate determination under which such stations would be permitted to continue operating as they have, but would not be eligible for mandatory cable carriage. The Commission recognizes that "the language of the Cable Act of 1992 may preclude such a conclusion." Indeed, the language and the legislative history of the Act are directly contrary to the Commission's suggestion. If shopping stations are serving the public interest, then they are entitled to cable carriage as much as any other stations.

The Act specifies that if the Commission determines that one or more shopping stations are not serving the public interest, "the Commission shall allow the licensees of such stations a reasonable period within which to provide different programming . . .." It does not provide the Commission with discretion to adopt a different remedy. Further, while section 4(g)(1) permits cable systems to deny carriage to shopping

stations, that exception to the must carry requirements is explicitly limited to the pendency of this proceeding. Once the proceeding is completed, the Act contemplates that stations with shopping formats will be fully eligible for mandatory cable carriage.

The legislative history is even more direct. The Conference Report states that:

> "If the Commission concludes that one or more of such stations is serving the public interest, convenience, and necessity, the conference agreement *requires the Commission to qualify such stations as local commercial television stations for purposes of must-carry.*"

H. REP. NO. 862, 102d Cong., 2d Sess. 75 (1992)(emphasis added). Moreover, as discussed *supra*, Congress rejected versions of the Act which would have deprived shopping format stations of must carry rights. The possibility of an intermediate choice under which stations with shopping formats would become "second class" licensees entitled to renewal, but not to cable carriage, is thus contrary to the intention of Congress.

Conclusion

For the foregoing reasons, the Commission should determine that stations offering a shopping format may serve the public interest, convenience, and necessity, and that those stations are fully eligible for mandatory cable carriage.

Respectfully submitted,

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